

BEFORE THE OHIO PEACE OFFICER TRAINING COMMISSION

IN THE MATTER OF:

**CINCINNATI POLICE CHIEF JAMES CRAIG'S PRIOR
EQUIVALENT TRAINING DETERMINATION APPEAL**

**CHIEF CRAIG'S BRIEF IN SUPPORT OF THE COMMISSION'S AND
EXECUTIVE DIRECTOR'S AUTHORITY TO WAIVE THE STATE
CERTIFICATION EXAM REQUIREMENT**

This brief addresses the sole legal question at issue: Does the commission and/or the executive director have the authority to waive the state certification exam requirement? Indeed, Ohio law specifically provides broad discretion to do so, and nothing in Ohio law limits that discretion or requires that the test be taken in order to obtain peace officer certification. Applying this clear legal authority to the unique facts of this case, the discretion to waive the testing requirement should be exercised.

I. The Executive Director and the Commission are Empowered with Both General and Specific Authority and Discretion to Waive the Testing Requirement

A. The Executive Director's and the Commission's General Authority and Discretion to Waive the Testing Requirement

Ohio law provides both the commission and the executive director with broad discretion in carrying out their duties and responsibilities, the most important of which is the certification of peace officers. Authority to waive the certification testing requirement in unique circumstances such as these falls squarely within that discretion.

The executive director, who acts on behalf of the commission, has the power and duty to "certify peace officers and sheriffs who have satisfactorily completed basic training programs," (Ohio Revised Code "ORC" § 109.75), and the commission has the power to "make recommendations . . . to the executive director" relating to the executive director's effectuation of the position's prescribed powers. (ORC § 109.73). Furthermore, Ohio law expansively defines the broad discretion of the executive director and the commission to do anything they deem "necessary or appropriate" to carry out those duties. (ORC § 109.75(1) (setting forth actions the executive director may take); ORC § 109.73(C)(6)

(setting forth actions the commission may take)). The only restriction on the executive director's and the commission's plenary power to do anything that is necessary and appropriate to carry out their duties is the requirement that this discretion not be exercised in an arbitrary or capricious manner. This means that their decision must not be founded on prejudice or preference, but rather must be based on reason or fact. See Black's Law Dictionary, (9th ed. 2009) (defining "arbitrary" and "capricious").

As applied here, in carrying out his duties to "certify peace officers" who satisfactorily complete "basic training programs", the executive director has the discretion to determine if someone has "satisfactorily completed [a] basic training program." Executive Director Fiatal agreed as much during the July 19 hearing: "Q: But standing alone, as you read this [ORC § 109.75] , that would give you the power to determine if somebody has satisfactorily completed it [the basic course]; is that right?; A. Yes, sir."¹ Thus, taking into account an individual's prior training, education, and experience, in conjunction with the public policy of the community to be served, the executive director is empowered to deem it "necessary or appropriate"² to waive the exam requirement and find that an individual has "satisfactorily completed"³ the basic training program. Likewise, if the commission similarly finds it to be "necessary and appropriate" to waive the exam requirement and finds that an individual has "satisfactorily completed" the basic training program, the commission can make that recommendation to the executive director so that he can act "on behalf of the commission." (ORC § 109.75). This broad grant of discretion is in no way expressly limited by any other provision in either the ORC or the Ohio Administrative Code ("OAC"). Thus, if the commission and/or executive director deem it "necessary or appropriate", they are vested with the authority to act accordingly.

¹ Hearing Transcript, pp. 88-89.

² ORC § 109.75(1).

³ ORC § 109.75.

B. The Executive Director's and the Commission's Specific Authority and Discretion to Waive the Testing Requirement

Ohio law clearly provides that the executive director has the power and duty to issue certificates of completion – thereby awarding certification – to individuals who complete the basic training course. OAC § 109:2-1-07, entitled “Certificate of Completion,” states that “[u]pon **successful completion of an approved peace officer training course**, a person appointed to a peace officer position . . . **shall be awarded a certificate of completion by the executive director.**” (Emphasis added). The OAC further provides that “successful completion” of the basic course means that the individual completed the requisite training hours; it does not mean that he/she passed the state certification exam. This is evidenced by the language in OAC § 109:2-1-11, entitled “Examination,” which states that “students who fail the retest shall not be permitted to take the final written examination again until they **successfully complete another peace officer basic training course.**” (Emphasis added). This phraseology could not state more clearly that “successfully completing” the basic course means completing the training, not passing the test.⁴

In other words, if someone “successfully” completes the basic course (i.e., completes the training), it is within the executive director’s discretion to award a certificate of completion to that individual, thereby certifying him or her as a peace officer in Ohio. This section does not mandate a testing requirement as a prerequisite to being awarded a certificate of completion. As applied here, Executive Director Fiatal waived 552 of the mandatory 582 training hours and tasked Chief Craig with 30 hours of training only on the Ohio Revised Code portion of the training course based upon Chief Craig’s extensive experience and training. Chief Craig timely completed the 30 hours of Ohio Revised Code training, thereby “completing” the basic training course. As such, based upon the plain language of OAC

⁴ As further proof that completing the basic course does not encompass taking the certification test, OAC § 109:2-1-09, entitled “Attendance”, states that “if a student misses more than five percent of the non-mandatory commission-required hours of the course, **the student may complete the course but shall not be permitted to take the final examination.**” (Emphasis added). Again, the OAC makes clear that completing the basic course does not entail taking (or passing) the certification test.

§ 109:2-1-07, Executive Director Fiatal may invoke his discretion to award a certificate of completion to Chief Craig without requiring him to take the examination.

At the hearing, however, the Attorney General's office countered that the executive director (and the commission) cannot waive the testing requirement for two reasons: (1) Ohio law makes a distinction between completing the basic "course" and completing the basic "program," and an individual can only receive certification upon completing the basic "program"; and (2) the executive director and commission are precluded from waiving the testing requirement by OAC § 109:2-1-11, which states that "each student recommended for certification must pass the final written examination . . ."⁵ However, as demonstrated below, both arguments are unavailing and do not alter the simple fact that a "certificate of completion" can be awarded upon "successful completion" of the basic training course.

1. *The Ohio Administrative Code Recognizes the Distinction Between Completing the "Basic Course" and Completing the "Basic Program," But Expressly Provides the Executive Director With the Power to Certify Individuals That Complete the "Basic Course"*

The Attorney General's office argues that the commission does not have the authority to waive the testing requirement because the executive director can only certify individuals who complete the basic training "program" rather than the basic training "course."⁶ The substance of their argument is that, while there is no testing requirement to complete the basic "course," the "course" is merely a subset of the overall "program," which requires that the test be taken and passed for certification.⁷ This argument, though, contradicts the plain wording of the OAC. While there may appear to be a distinction between "program" and "course," the distinction has no relevance here. It is true that ORC § 109.75 – which sets forth the executive director's powers and duties – specifically states that: "The executive director . . . , on behalf of the commission, shall have the following powers and duties . . . (D) to certify peace officers and sheriffs who have satisfactorily completed basic training programs." Yet, an integral step in construing

⁵ Hearing Transcript, pp. 7-8, 140-41.

⁶ Hearing Transcript, pp. 140-41.

⁷ *Id.*

statutory language is the context in which the words are used. Here, the ORC fails to define what constitutes “satisfactory completion” of the basic training program or even what comprises the basic training “program.” More importantly, however, the ORC fails to provide an answer to the pivotal question at issue: is the testing requirement a prerequisite to “satisfactorily” completing the “basic training program”? The answer to that question, as provided for in the OAC, is “no.”

The portion of the OAC that provides the support for this answer is § 109:2-1, which is entitled “Basic Training Program.” Under the definition section of that provision (OAC § 109:2-1-02(D)), the term “basic course” is defined as being “the training prescribed in rule 109:2-1-16 of the Administrative Code” Thus, as the Attorney General’s office suggests, the OAC explicitly recognizes the difference between the “basic course” (defined as “the training”) and the “basic training program,” which, while not defined, presumably means something more than just “the training.” Recognizing this distinction, the OAC then explicitly states that “upon successful completion of an approved peace officer **basic training course**, a person appointed to a peace officer position . . . **shall be awarded a certificate of completion by the executive director.**” (Section 109:2-1-07, “Certificate of Completion”).⁸ In other words, the executive director has discretion to issue a certificate of completion to those completing the basic training “course” (which is defined in the OAC), not just upon completion of the “program” (which is undefined in the OAC). Therefore, while the OAC does distinguish between “course” and “program”, the statute still provides that a certificate of completion can be awarded upon completion of the “basic training course.”⁹ Furthermore, nowhere does the statute say that passing the certification test is required to complete the “basic training course.”

⁸ Under OAC § 109:2-1-07, it states that the “Rule Amplifies R.C. 109.75”, meaning that the rule “expands upon, further details, or clarifies (i.e., amplifies or implements).” *Arndt v. P&M, Ltd, et al.*, 2008 WL 2042831, ¶40 (11th Dist. App., May 9, 2008). Therefore, this section expands upon and clarifies the “powers and duties” of the executive director as stated in ORC 109.75, and provides him/her with the power to issue certificates of completion to those completing the “basic training course” – as provided for in the OAC.

⁹ Furthermore, ORC § 109-79, which is entitled “Ohio peace officer training academy”, states that “the commission shall develop the training program, which shall include courses in both the civil and criminal functions of law enforcement officers,” along with several other courses. However, this section – which defines what the “training program” consists of – significantly omits a testing requirement.

While both the “basic course” and “examination” provisions are encompassed under the overall “basic training program,” the Legislature recognized the distinction between “course” and “program” and chose to give the executive director discretion to award a certificate of completion upon completion of the basic training “course,” and not solely upon the ultimate completion of the basic training “program.”

The Attorney General’s office next argues that there is no exception to the following language in OAC § 109:2-1-11: “Each student recommended for certification must pass the final written examination with a minimum score to be determined by the commission.”¹⁰ However, this language is inapplicable to this situation because the term “student” is undefined and cannot be logically ascribed to an incoming police chief such as Chief Craig that did not attend the full academy.¹¹ Furthermore, this language cannot be read in a vacuum devoid of the contextual provisions in the ORC and OAC that give the executive director broad discretion to award certification.

First, the term “student” is not defined in the “Definitions” section of the OAC (§ 109:2-1-02). The term “training recruit” is defined, but Chief Craig clearly does not fit within that definition. A “training recruit” is a “fulltime employee of a law enforcement agency whose primary duty is to attend and successfully complete the basic course and who, upon completion of the basic course, is appointed as a peace officer by that agency.” (OAC § 109:2-1-02). While Chief Craig is a fulltime employee of a law enforcement agency, his “primary duty” was not to attend and complete the basic course. This provision obviously refers to those individuals who completed the entirety, or a majority, of the 582-hour basic training course over the six month period (where it was their “primary duty”), and not someone, such as Chief Craig, that completed only 30 hours over a sporadic period of time. Furthermore, “upon

¹⁰ Hearing Transcript, p. 138.

¹¹ The term “recommended for certification” is similarly undefined and neither the ORC nor the OAC provide what it means to be “recommended for certification.” Does it mean that the “student” has successfully completed the basic course and is ready to take the test? Who makes the recommendation? Can someone successfully complete the basic course but not be “recommended for certification”? The phrase is, therefore, ambiguous and subject to several different meanings.

completion of the basic course” Chief Craig will not be “appointed as a peace officer” by the City of Cincinnati. He has already been appointed Chief of Police, and his certification will not change that fact.

Lastly, even if the language in OAC § 109:2-1-11 has the meaning attributed to it by the Attorney General’s office, that meaning does not obviate or override the discretion provided to the executive director in ORC § 109.75 (to do that which is “necessary or appropriate” to carry out his duties) or OAC § 109:2-1-07 (“upon successful completion of an approved peace officer basic training course,” an individual can be “awarded a certificate of completion” by the executive director, without reference to a testing requirement). Thus, the language in OAC § 109:2-1-11 must be read in context with – and not as contradicting – the language of other provisions of the OAC and ORC, which **do** provide the executive director with discretion to waive the testing requirement.

II. The Executive Director and the Commission Should Exercise Their Discretion and Waive the Testing Requirement in this Case

The fact that neither the commission nor the executive director has ever waived the testing requirement, a power explicitly provided to them under Ohio law, is not a valid reason not to do so now. The importance and uniqueness of this situation cannot be overstated, and the circumstances on which this request is being made dictate that the commission and the executive director exercise their discretion for the following reasons: (1) the testing requirement undermines the Cincinnati City Charter change that was ushered in by the passage of Issue 5; (2) waiving the testing requirement based on Chief Craig’s extensive experience and training as a law enforcement officer would put Ohio in line with nearby jurisdictions; and (3) the test is designed and meant for graduating academy recruits, not a police chief with 36 years of experience and training.

First, as was discussed at length during the hearing, the passage of Issue 5 and consequent amendment of the Charter of the City of Cincinnati represented a seminal moment in the City’s history. For the first time, the selection of a police chief from outside the department ranks was permitted as a matter of law. The prior system for choosing candidates for chief of police dictated that the chief be selected from a list comprised solely of internal candidates, consisting of a narrow applicant pool of only

Cincinnati assistant chiefs. Thus, the purpose of Issue 5 was to increase and diversify the candidate pool in order to attract the best, most-qualified candidates from across the country, not just the most qualified within the department, and the citizens embraced this new approach.

However, as Chief Craig testified at the hearing, requiring an out-of-state police chief with decades of experience and training to prepare for and take a 200-question exam covering 582 hours worth of material will assuredly deter future, out-of-state candidates from applying, thereby narrowing the applicant pool.¹² Such a requirement clearly undermines the purpose of Issue 5, which seeks to increase the applicant pool. Likewise, Issue 5 was clearly meant to give outsiders a viable opportunity at leading Cincinnati's Police Department; yet, the testing requirement creates an imbalance that tilts the process in favor of the internal and in-state candidates – some of whom have not had to take the test, and still would not if they were selected as chief.¹³

While it is appreciated that the commission is charged with protecting the general public through the imposition of standards that ensure the proper training of police officers, the commission must also ensure that the public policy of the community being policed is not simultaneously subverted. In other words, when exercising its authority to see that individuals are properly trained, the commission must give equal consideration to its duty that those standards do not amount to a subversion of enacted public policy of the community being served. Issue 5 is the citizen-approved public policy of Cincinnati, and the imposition of a testing requirement in this instance undermines the very purpose for which it was passed.¹⁴

Second, waiving the testing requirement here, based upon Chief Craig's 36 years of experience and training, would put Ohio in line with several other nearby states. For instance, Illinois provides that

¹² Hearing Transcript, pp. 121-22.

¹³ Hearing Transcript, pp. 35-38 (where Chief Ferrell stated that "thousands" of police officers – who had been police officers prior to 1988 – were "grandfathered" in and were exempt from taking the state certification exam that is at issue here).

¹⁴ Admittedly, however, Executive Director Fiatal was unaware of Issue 5 and, as a result, did not take it into consideration when rendering Chief Craig's prior equivalency determination. See Hearing Transcript, pp. 100-01.

the executive director may grant a waiver of basic training requirements . . . if, by reason of extensive prior experience as a law enforcement officer . . . the basic training program is illogical or unreasonable.” 20 Ill. Admin. Code 1720.15. This includes the power to waive the “equivalency exam.” *Id.* Michigan provides that the “commission may establish requirements for exemption from various skill performance examinations, with due consideration for . . . (i) previous training and experience [and] (ii) the position for which employment is sought.” Mich. Admin. Code R. 28.14409. Finally, Tennessee law states that the “commission shall . . . issue certification to persons who, by reason of experience or specialized training, are especially qualified for particular aspects or classes of police work.” T.C.A. §38-8-107. Thus, Ohio would certainly not be the first state to take into account an applicant’s prior training, experience, and position as a justification for waiving the certification exam requirement.

Finally, the exam was designed to test graduating recruits on the “basics” of being a police officer; it is clearly not designed to test a police chief with 36 years of experience and training far beyond that which is required to “complete the basic course.” First, the exam is crafted to test academy recruits who actually **complete the basic course** (582 hours of coursework), and not a police chief who was only required to complete 30 of those mandated 582 hours. As the “Examination” requirement in OAC § 109:2-1-11(A) states, “the Ohio peace officer training commission will prepare, conduct, and score a final examination **for each person completing the basic course.**” Thus, as the code states, the test is meant for those “completing” the entirety of the basic course, not those tasked with completing only 5% of it.

Moreover, as Executive Director Fiatal testified, “obviously the majority” of individuals who take the exam are considered entry level recruits because the purpose of the exam is to test the “basics” of being a police officer.¹⁵ However, the duties and responsibilities of entry level police officers (i.e., the “basics”) differ drastically from that of a major city police chief tasked with leading an entire police department. Accordingly, the test is simply inapplicable to Chief Craig’s duties as a police chief and will in no way assess his duties in that role, which consist primarily of broad organizational and management

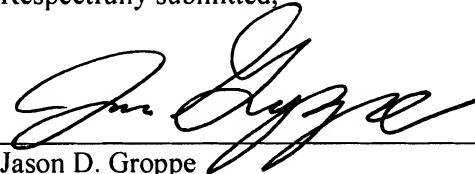
¹⁵ Hearing Transcript, pp. 38-39.

tasks. Executive Director Fiatal even agreed as much in his testimony.¹⁶ It is certainly recognized and acknowledged that the commission certifies “police officers”; however, Chief Craig is a police officer with 36 years of experience, training, and certification in three other states. He simply requests that the Commission recognize the inaptness of using the examination as a tool to assess his duties and responsibilities as a police chief and take that into overall consideration – like the other jurisdictions mentioned above – in their decision to exercise their discretion and waive the testing requirement.

III. Conclusion

Ohio law does not state that the testing requirement is a prerequisite to receiving certification, and both the executive director and the commission have broad discretion to certify peace officers. Based on the law, the public policy embodied in Issue 5, and Chief Craig’s experience, it is respectfully requested that the Commission and the Executive Director waive the testing requirement and award Chief Craig peace officer certification in Ohio.

Respectfully submitted,



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¹⁶ Hearing Transcript, pp. 39, 51.